

Republic of Cyprus' FDIS Bill: State of Play

(CELIS Institute Country Reporters for the Republic of Cyprus Dr. Thomas Papadopoulos and Mr. Pantelis Christofides¹)

A. Introduction: The Public Consultation Process and Parliamentary Scrutiny Process

Taking a long awaited and much anticipated step, the Republic of Cyprus, electing to proceed via the Ministry of Finance (**MINFIN**), published, on 24th June 2022, an Announcement regarding the Public Consultation as to a draft Bill related to effect of certain provisions of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (**EU FDIS Regulation**) in the Republic of Cyprus² (**the draft Bill**), whilst placing the draft Bill in a public consultation process which ended on 8th July 2022.

An updated FDIS Bill (**the Bill**), encompassing a number of amendments *vis – à – vis* the draft Bill, was subsequently published at the Republic of Cyprus House of Representatives' website, as submitted by the Ministry of Finance, during the Parliamentary Session of 22nd September 2022³, accompanied by the relevant Impact Assessment Questionnaire⁴.

B. Bill: Main Provisions & Initial Comments

The Bill entitled '*The Establishment of a Framework for the Screening (Control) of Foreign Direct Investments in the Republic of Cyprus Law of 2022*' envisages, inter alia, the following:

1. The Ministry of Finance of the Republic of Cyprus (**MINFIN**), rather than the Minister of Finance of the Republic of Cyprus *in personam* as stipulated in the draft FDIS Bill, has been designated by the Bill as the Competent Authority for Foreign Direct Investment (**FDI**) Screening and the National Contact Point pursuant to the EU FDIS Regulation.
2. With the Article 2 EU FDIS Regulation definitions being repeated, MINFIN proceeded with opting in the 10% mark regarding the element of control or right of use of a company, whether directly or indirectly, with the alternative element of control related to rights of contracts or other means via which, whether in isolation or conjunctively, decisive influence can be provided

¹ Dr. Thomas Papadopoulos, Assistant Professor – University of Cyprus (CELIS Fellow) and Pantelis Christofides, Advocate – Director, L. PAPAPHILIPPOU & CO LLC Advocates & Legal Consultants (CELIS Fellow). The views expressed in the present Briefing Note are strictly personal and represent the state of play as at 2nd October 2022.

² The content of the **Republic of Cyprus Ministry of Finance Announcement dated 24th June 2022** as well as the text of the draft Bill are accessible at [Ministry of Finance - Announcement 24th June](#).

³ See to that effect Bill number 26 (Bill File Number 23.01.063.157-2022), as part of the House of Representatives' Bills' Submission List, accessible, via the House of Representatives website, with electronic address <http://www.parliament.cy/images/media/redirectfile/01-katathesi%20220001.pdf>.

⁴ A copy of the Bill and the associated documents are accessible, via the House of Representatives website, with electronic address [Bill and Associated Documents](#).



over the composition, voting or decision making process of the governing bodies of an undertaking or any other legal entity.

3. Regarding the obligation to file a Notification and secure the prior Approval of the Competent Authority, the Bill spells out the following:

- 3.1** 'Foreign investor' has not been defined, whilst reference is made to the definitions under the EU FDIS Regulation.
- 3.2** 'An undertaking of strategic importance' has been defined as an undertaking which is based and active in the Republic of Cyprus and pursues activities falling within the particularly sensitive sectors as these are defined at Schedule I of the Bill.
- 3.3** A foreign investor willing to proceed to an FDI which aims, or will result, to the acquisition of special participation in an undertaking of strategic importance, must notify the intended FDI before the Competent Authority, providing the prescribed information and to secure the relevant prior Approval of the Competent Authority.
- 3.4** Special participation has been defined as the acquisition, whether directly or indirectly, severally or jointly with other persons, of a percentage of at least 10% of the share capital and/or the voting rights or equivalent possibility of exercising decisive influence over the undertakings' activities.
- 3.5** No threshold as to the FDI's value has been included in the Bill.
- 3.6** The obligation to file a Notification and to secure the prior Approval of the Competent Authority applies *mutatis mutandis* in the following instances regarding an existing investment in an undertaking of strategic importance:
 - 3.6.1** in the event that the shareholding/control structure of the investor is altered to the effect that at least 10% of the voting shares is held severally or jointly with other persons by a foreign investor, or
 - 3.6.2** in the event that an investment has already been performed in an undertaking of strategic importance, the control of the said undertaking has, whether directly or indirectly, been assumed by a foreign investor.
- 3.7** Any undertaking, organisation, foundation or other legal entity, in which at least 10% of the share capital and/or the voting rights are being held by a foreign investor and/or the ultimate beneficial owner is a foreign investor and/or in which a foreign investor possesses, whether directly, or indirectly, the control of the relevant undertaking or legal entity, and which intends to proceed to an FDI, is also subject to the obligation to file a Notification before and secure the prior Approval of the Competent Authority.
- 3.8** As to the Notification related information requirements, the Bill essentially reproduces the content of Article 9(2) of the EU FDIS Regulation, whilst also providing for the power of the Competent Authority to request any additional information that the Competent Authority may consider as necessary during the performance of the jurisdiction thereof pursuant to the Bill. It is also noted that no provision has been included referring to the content of the Notification Form published by the EU Commission in relation to a Request



for information from the investor for the purposes of notifications pursuant to EU FDIS Regulation Article 6⁵.

3.9 The indicative criteria and factors which can be considered during the screening of an FDI are presented in Schedule I of the Bill as follows:

A. Factors that could be taken into consideration by the Competent Authority when assessing whether an FDI is likely to affect the security or the public order of the Republic of Cyprus include the following:

- (a) whether the business in relation to which an FDI has taken place or is about to take place is active in a particularly sensitive sector that relates to critical infrastructure, whether physical or virtual, including infrastructure in the sectors of energy, transport, water, health, communications, media, data processing or storage, defence or electoral services or *financial services including the systemic credit institutions*, sensitive facilities, as well as land and real estate crucial for the use of such infrastructure (*our emphasis*).
- (b) the possible consequences of an FDI as far as access to sensitive information is concerned, including personal data, or the ability to control such information; or
- (c) the freedom and pluralism of the media.

B. In order to determine whether an FDI could affect the security or the public order of the Republic of Cyprus, the Competent Authority can additionally take into account, in particular:

- (a) whether the foreign investor is directly or indirectly controlled by the Government of a Third Country, including state bodies or armed forces, inter alia, through the ownership structure or the provision of significant funding;
- (b) whether the foreign investor has already been involved in activities affecting the security or the public order of a Member State of the European Union;
- (c) whether there is a serious risk that the foreign investor engages in illegal or criminal activities;
- (d) whether, with the implementation/application of the FDI under scrutiny, a sufficient dispersion of the shares' base is safeguarded and/or maintained and/or the ability of other investors to take part in the undertaking of strategic importance and in the decision – making bodies of the said undertaking.

3.10 As illustrated by the content Paragraph A of Schedule I of the Bill, MINFIN has considered appropriate, possibly due to the importance and impact of the said sector on the economy of the Republic of Cyprus, to include financial services' related undertakings, with a specific inclusion reference as to the systemic credit institutions, as part of the strategic importance undertakings' classification. This could indeed, potentially, be interpreted as having an impact on existing acquisitions of the shareholdings in financial services' related undertakings, including funds, as well as in non-performing exposures' portfolio related rights (credit purchasers and credit servicers).

⁵ See to that effect <https://circabc.europa.eu/ui/group/be8b568f-73f3-409c-b4a4-30acfcec5283/library/aac8130b-3b40-4bd1-99b5-147447189f23/details>, as lastly modified on 4th July 2022.

- 3.11** The Competent Authority is empowered to exercise the absolute discretion thereof, to allow, prohibit, unwind or subject the notified FDIS to terms or conditions, whilst no restrictions to ambit of such terms and conditions have been included in the Bill.
- 3.12** The Competent Authority is under a corresponding duty, to:
- 3.12.1** issue a Decision on whether the specific FDI will be screened – scrutinised pursuant to the indicative Schedule I factors and criteria within 10 business days as at the date of receipt of a fully completed Notification – Application for approval of the FDI. During the said evaluation, the Competent Authority is empowered to request further information and/or documentation and/or explanations and/or clarifications considered necessary for the purposes of the relevant evaluation;
- 3.12.2** inform the relevant foreign investor as to the Competent Authority’s Decision on whether or not the specific FDI will be scrutinised within 5 business days as at the date of issuance of the above - mentioned Decision; and
- 3.12.3** subsequently, decide within 60 business days from the date of issuance of the above – mentioned Decision whether or not the FDI under scrutiny could infringe the security or public order of the Republic of Cyprus.
- 3.13** In the event that any person, whether legal or natural, that is related to an FDI concerning which a duty to file a Notification pursuant to the Bill existed, fails to proceed with the acquiring the relevant Approval of the Competent Authority, then the specific FDI will be automatically regarded as being in violation of the Bill, and the Competent Authority has been empowered, in exercising its absolute discretion, to take all and/or any measures in the possession thereof, so as to prohibit or terminate or reverse the specific FDI.
- 3.14** Further, contracts and/or agreements and/or transactions which concern actions for which the prior Approval of the Competent Authority is required pursuant to the provisions of the Bill, will be considered as being subject to the condition precedent of securing the relevant Approval of the Competent Authority.
- 3.15** The Decisions of the Competent Authority under the Bill are subject to Judicial Review, pursuant to the provisions of the Constitution of the Republic of Cyprus and the General Principles of Administrative Law of 1999 (Law no. 158(I)/1999) as amended.
- 3.16** As to Administrative Sanctions, the Competent Authority has been empowered to impose the following sanctions to a foreign investor or to any person, whether legal or natural, that is related to an FDI which falls within the provisions of the Bill, for infringing or failing to comply with the following provisions of the Bill:
- 3.16.1** an administrative fine in the region of €5.000 - €50.000, to a foreign investor that omits to file an FDI Notification before the Competent Authority;
- 3.16.2** an administrative fine up to €100.000 for provision of false or misleading information within the ambit of complying with a corresponding obligation imposed by any provision of the Bill;
- 3.16.3** an administrative fine up to €50.000 for the omission to provide information within the ambit of complying with a corresponding obligation imposed by any provision of the Bill;

- 3.16.4** an administrative fine up to €100.000 for omitting to comply within the time period provided for by Article 7(2) of the Bill, with any measure ordered by the Competent Authority and, additionally, an administrative fine up to €8.000 per day during which the infringement continues.
- 3.17** Such administrative sanctions can be imposed within the ambit of the issuance of a fully reasoned Decision, with the Competent Authority taking into account the seriousness and duration of the specific infringement and after granting the opportunity to be heard to the affected person. Further, the Bill notes that the imposition of any administrative sanction does not prejudice any other rights and/or powers of the Competent Authority pursuant to the provisions of the Bill.
- 3.18** MINFIN is entitled to proceed with taking the necessary steps for applying to Court for the issuance of a restrictive order or an order of a mandatory nature, including an injunction, in the event that MINFIN ascertains that an infringement of the Bill's provisions has taken or will take place, even in the absence of proof of real damage.
- 3.19** The Minister of Finance *in personam* has been afforded with the discretionary power to amend or replace the content of Schedule I of the Bill. To that effect, it is noted that the issuance of an Order by the Executive does not necessitate laying it for Parliamentary scrutiny prior to the enactment thereof via publication in the Official Gazette of the Republic of Cyprus.
- 3.20** Although it is envisaged that the Bill will have legal effect upon enactment, that being after the conclusion of the House of Representatives' Plenary voting process, and the subsequent publication thereof into Law in the Official Gazette of the Republic of Cyprus, the precise retroactive date of application of the Notification submission requirement as to existing qualifying FDI's is still unclear. Clarifying this issue will be of vital importance in accordance with the Principles of Legal Certainty and Transparency, as a great number of significant investments in the sectors of energy, transportation, health, education and financial services had been materialised during the 15 months' time period leading to October 2022.
- 3.21** A potential enumeration of the terms or conditions which could be imposed by the Competent Authority, and an express mention to the Principle of Non – Discrimination encapsulated by the EU FDIS Regulation, along with the non – inclusion of the MINFIN power to unilaterally amend Schedule I of the Bill, could also be viewed as positive step in upholding the above – mentioned Legal Principles.
- 3.22** It is reasonably anticipated that Regulators of licensed providers of legal, administrative and other regulated services will be corresponding with such regulated providers so as to inform them regarding the content and potential impact of the Bill.
- 3.23** To that effect, a suggestion could be placed that the EU Commission's Better Regulation Guidelines should be taken into account by both the Republic of Cyprus as well as such Regulators, and in particular to 'consult broadly and transparently among stakeholders, who

might be concerned by the initiative, seeking a whole spectrum of views in order to avoid bias or skewed conclusions promoted by specific constituencies ('regulatory capture')⁶.

- 3.24** Further, an Impact Assessment Study could address compliance with the principles of Rule of Law and Administrative Law Principles including independence and absence of conflict of interests.

C. Bill: the Way Forward

The Bill was discussed before the House of Representatives' Parliamentary Committee on Financial and Budgetary Affairs (**the Parliamentary Committee**) during the 26th September 2022 Session thereof, in the presence of stakeholders including the Institute of Certified Public Accountants of Cyprus (ICPAC), the Cyprus International Businesses' Association (CIBA)⁷ and the Association of Cyprus Banks (ACB).

An interesting article regarding the content of the discussion held before the Parliamentary Committee, along with suggestions submitted by ICPAC and CIBA was published, by Stockwatch.com.cy, under the title 'The Bill regarding the banks' takeover is placed before the Plenary on an Urgent Basis'⁸.

Conclusively, it is noted that, as it can be logically deduced from the title of the Bill, that the Bill's text along with the Impact Assessment Questionnaire and Reasoned Opinion will be placed before the Legislative Body of the Republic of Cyprus, that being House of Representatives, for scrutiny and debate within the course of year 2022, in the presence of Stakeholders, whilst the public and such Stakeholders can keep track of the Parliamentary scrutiny process regarding the Bill via the website of the House of Representatives⁹.

As CELIS Institute Country Reporters for the Republic of Cyprus, we will be providing an update on the Bill on the basis of such developments.

⁶ See to that effect **EU Commission Staff Working Document**, '*Better Regulation Guidelines*', Brussels, 3.11.2021, SWD(2021) 305 final, at page 19, accessible at https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en.

⁷ In upholding the Transparency Principle, it is noted that Pantelis Christofides, acting as Advocate – Director of L. PAPAPHILIPPOU & CO LLC, CIBA Legal Consultants, participated, as part of the CIBA Team, during the relevant discussion and submission of suggestions before the Parliamentary Committee regarding the Bill.

⁸ See to that effect the article, in Greek, dated 26th September 2022 and entitled 'Αρον άρον στην Ολομέλεια το νομοσχέδιο για εξαγορά τραπεζών', published by Mrs. Eleni Charalambous, of the Cyprus financial news related press online journal Stockwatch.com.cy, accessible at <https://www.stockwatch.com.cy/el/article/voyli-trapezes/aron-aron-stin-olomeleia-nomoshedio-gia-exagora-trapezon>.

⁹ See to that effect [Livestream - House of Representatives](#) as to the Weekly Work Schedule of the House of Representatives' Committees, and [Plenary Agenda - House of Representatives](#) regarding the House of Representatives' Plenary Agenda.